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Chapter 13
Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. Meetings of major economies

In 2009, President Obama announced the inception of the Major Economies Forum on Energy and Climate ("MEF"). See *Digest 2009* at 485-88. The thirteenth session of the MEF took place on November 16-17, 2011 in Crystal City, Virginia and provided an opportunity for an exchange of views leading up to the Seventeenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change ("UNFCCC") in Durban, South Africa ("COP-17"). See State Department November 16, 2011 Media Note, available at www.state.gov/r/pa/prs/ps/2011/11/177247.htm.

b. UN Framework Convention on Climate Change: Conference of the Parties

The United States participated in the Seventeenth Session of the Conference of the Parties to the UN Framework Convention on Climate Change ("UNFCCC") in Durban, South Africa, November 28-December 9, 2011. Among other outcomes, the Conference launched a process to develop, by 2015, an agreement that will apply from 2020. The decision by the Conference is available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf. Among the notable features of the decision was the agreement to:

> launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action.

2. Ozone Depletion

On May 9, 2011, the United States, Canada, and Mexico submitted a joint proposal to phase down use of hydrofluorocarbons ("HFCs") under the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol"). See *Digest 2010* at 542-44 and *Digest 2009* at 493-95 for past versions of the proposal to reduce the use of HFCs presented by the three countries. The three countries presented the proposal at the Twenty-third Meeting of the Parties to the Montreal Protocol, November 21-25, 2011. The report of the Twenty-third

Meeting of the Parties is available at *http://conf.montreal-protocol.org/meeting/mop23-cop9/draft-reports/Draft%20Reports/MOP-23-11-COP-9-7E.pdf*. The Department of State issued a media note describing the proposal, excerpted below and available in full at *www.state.gov/r/pa/prs/ps/2011/05/162930.htm*.

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Today, the United States, Canada, and Mexico have submitted a joint North American proposal to phase down the use of hydrofluorocarbons (HFCs) under the Montreal Protocol on Substances that Deplete the Ozone Layer. This joint effort represents a major step toward addressing the mounting threat of global climate change while also preserving the ozone protection benefits of the Montreal Protocol.

At last year's Meeting of the Parties, 90 countries signed a declaration recognizing that the projected increase in the use of HFCs poses a major challenge for the world's climate system. HFCs do not damage the ozone layer, but they are powerful greenhouse gases used as replacements for ozone-depleting substances that are being phased out under the Montreal Protocol. These 90 countries declared their intent to pursue further action to transition the world to environmentally sound alternatives to ozone-depleting substances.

Building on this commitment, the North American proposal calls on all countries to take action to reduce their consumption and production of HFCs. Developed countries would lead the effort beginning in 2015 to gradually phase down to 15% of baseline levels by 2033. Developing countries would take their first step to control HFCs in 2017, phasing down to 15% of baseline levels by 2043. The amendment proposal, backed by an accompanying decision proposal, also takes action to reduce HFC-23 byproduct emissions. A preliminary analysis by the U.S. Environmental Protection Agency indicates that the North American amendment proposal would produce a reduction benefit of more than 98 gigatons of carbon dioxide equivalent by 2050.

The problem of HFCs is closely linked with the phaseout of ozone-depleting compounds, including the ongoing accelerated phaseout of hydrochlorofluorocarbons (HCFCs). Without action, the HCFC phaseout and increasing global demand for refrigeration and air-conditioning are anticipated to drive continued growth in HFC production and consumption. Given the ongoing transition away from HCFCs, our proposal recognizes that this is the opportune time to encourage both the use of existing climate-friendly alternatives and the development of innovative, new alternatives that do not harm the ozone layer or climate system.

Together with our partners Canada and Mexico, the United States believes that global action on HFCs is needed and that the Montreal Protocol provides an established, effective and efficient instrument for tackling this problem. The United States looks forward to working with its partners in the run up to the 23nd Meeting of the Montreal Protocol Parties in November in Bali to make the most effective use possible of the tools available today to safeguard the ozone layer and protect the global climate system.

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3. Litigation in U.S. courts regarding greenhouse gas emissions

In 2011, the United States participated as a party in an appeal before the United States Supreme Court of an action brought against several power companies, including the Tennessee Valley Authority, which is a federal entity. *American Electrical Power Co. et al. v. State of Connecticut et al.,* Case No. 10-174. Plaintiffs, several U.S. states and some private entities, brought the action seeking to impose and enforce a scheme to control the power companies' emissions. The lower court had dismissed the case as involving a non-justiciable, political question. The U.S. Court of Appeals for the Second Circuit reversed, holding that the plaintiffs could maintain their actions under federal common law alleging that the power companies caused a "public nuisance" by contributing to global warming, reasoning, in part, that the federal government had not yet acted to limit emissions. 582 F.3d. 309 (2nd Cir. 2009).

The Supreme Court decided the case on June 20, 2011. *American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527 (2011). A majority of the court agreed that actions by the Environmental Protection Agency ("EPA") authorized by the Clean Air Act ("CAA") displace any federal common-law right to seek abatement of emissions. 131 S.Ct. at 2539. The court reasoned:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. See generally *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865–866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.
>
> Notwithstanding these disabilities, the plaintiffs propose that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," … and then decide what level of reduction is "practical, feasible and economically viable," …. These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs. Similar suits could be mounted, counsel for the States and New York City estimated, against "thousands or hundreds or tens" of other defendants fitting the description "large contributors" to carbon-dioxide emissions. …
>
> The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision-making scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same

limits, subject to judicial review only to ensure against action "arbitrary, capricious, ... or otherwise not in accordance with law." § 7607(d)(9).

Id. at 2539-40.

The United States opening brief in the case when it was before the U.S Supreme Court, filed in January 2011, presented the argument—which was accepted by a majority of the Supreme Court in its decision—that the regulation of emissions had been displaced by federal action, in particular actions by the EPA authorized by the CAA. Excerpts discussing this displacement argument from the United States opening brief follow. The brief is available at *www.justice.gov/osg/briefs/2010/3mer/2mer/2010-0174.mer.aa.pdf*. The U.S. reply brief is available at *www.justice.gov/osg/briefs/2010/3mer/2mer/2010-0174.mer.rep.pdf*.

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Instead of relying on any CAA standards or cause of action, plaintiffs have elected to sue a handful of defendants from among an almost limitless array of entities that emit greenhouse gases. Moreover, the types of injuries that plaintiffs seek to redress, even if concrete, could potentially be suffered by virtually any landowner, and to an extent, by virtually every person, in the United States (and, indeed, in most of the world). …

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…[The Court] should hold that plaintiffs cannot state a claim for public nuisance under federal common law because any such claim has been displaced by the actions that EPA has taken under the CAA to regulate carbon-dioxide emissions.

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Exercising its regulatory authority under the CAA, EPA has directly entered the field plaintiffs would have governed by common-law nuisance suits. Since January 2, 2011, greenhouse gases have been subject to regulation under the CAA, and EPA is actively exercising its judgment and statutory discretion to determine when and how emissions from different categories of sources of greenhouse gases will be regulated. As a result, the CAA, as implemented by EPA, speaks directly to the question of how carbon-dioxide emissions should be limited and thus displaces any common-law claims pertaining to that question.

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…EPA now regulates greenhouse-gas emissions under the currently existing statutory scheme of the CAA, and it may soon be specifically committed to completing a rulemaking to address greenhouse-gas-emissions standards applicable to defendants' already-existing power plants, even if they are not modified. Thus, it is abundantly

clear that the CAA, as it is now being implemented by EPA, "speak[s] directly" (*Milwaukee II*, 451 U.S. at 315 (quoting *Mobil Oil*, 436 U.S. at 625)) to the particular issue presented by plaintiffs' federal common-law nuisance claims about climate change: regulation of greenhouse-gas emissions, and in particular emissions from stationary sources (like defendants' power plants).

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4. Sustainable Development

In 2011, the United States participated in the preparatory process for the United Nations Conference on Sustainable Development ("Rio+20"), set to take place in Rio de Janeiro, Brazil in June 2012 coinciding with the 20th anniversary of the 1992 United Nations Conference on Environment and Development in Rio in 1992. Rio+20 is to focus on two themes: a green economy in the context of sustainable development and poverty eradication and the institutional framework for sustainable development. Participants were invited to make submissions by November 1, 2011 for inclusion in a compilation to serve as the basis for preparation of a draft outcome document for the Conference in 2012. The United States made its submission on November 1, 2011. The United States submission, excerpted below, included the U.S. view that the United Nations Environment Program ("UNEP") should be strengthened rather than creating a new institution to coordinate environmental programs and cooperation. The full text of the submission is available at *www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=370&menu=20*.

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OUR VISION

The United States welcomes the opportunity to join the global community and engage representatives from across society to chart a course for the future of sustainable development. At the upcoming UN Conference on Sustainable Development (Rio+20) we aspire to explore ways to better integrate the economic, social, and environmental dimensions of sustainable development, building on the successes of the 1992 Earth Summit and the 2002 World Summit on Sustainable Development. Since we last convened, world population has risen to 7 billion and is expected to increase to 9 billion by 2050, with many still living on less than $2.00 a day. Rio+20 must prioritize resource productivity and efficiency as ways to promote sustainable development. At the same time, global institutions have shifted to recognize the rise, roles, and responsibilities of major emerging economies. Within this new landscape, we recognize that sustainable development is not a luxury; it is a necessity for countries at all stages of development.

The Obama Administration has set a strong foundation and trajectory for enhancing sustainability and building a green economy at home and abroad. Our Global Development Policy recognizes that sustainable development offers a promise of long-term, inclusive, and enduring growth that builds on accountability, effectiveness, efficiency, coordination, and innovation. Rio+20 should seek to make governments around the world more transparent and

accessible, to better engage citizens, and to build new networks across all sectors of our societies. The role of women and youth is also fundamental to securing a sustainable future.

We recognize that sustainable development offers pathways out of short-term disruptions, such as financial shocks, and long-term challenges, such as climate change. We are also committed to spurring developments in science and innovation through the use of incentive systems; investments in education, the workforce, and basic research; and promoting innovative, open, and competitive markets, supported by strong protection for intellectual property rights and transparent, science-based, regulatory approaches and standards. Respect for international obligations as we chart a future course for sustainable development is also critical.

At Rio+20, the global community should re-energize action on sustainable development through a concise, political statement that focuses on actionable high-level messages. Each conference participant should also come to Rio with their own "compendium of commitments" that describes in detail how the individual groups or coalitions of participants will undertake action to help build a sustainable future. The meeting itself should be a marketplace of ideas, and we look forward to presentations, side events, and the launch of networks and initiatives during the civil society days and the Conference that advance inclusive action on sustainable development.

In this submission, we highlight three key messages that speak to the evolving sustainable development agenda:

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THE INSTITUTIONAL ENVIRONMENT: MODERNIZING GLOBAL COOPERATION

Making New Connections: Linking Governments, Communities, and Businesses for Action

The second theme of Rio+20, Institutional Framework for Sustainable Development (IFSD), speaks to how participants in the Conference and broader networks of stakeholders can achieve the goals of sustainable development. …

… Governments should strive to create the enabling environments to allow innovation to flourish and to spur greater investment in the development and application of ground breaking technologies to solve global challenges. This February [2012], the United States will host a conference on "*Rio+2.0: Bridging Connection Technologies and Sustainable Development"* as one way to identify strategic opportunities to generate solutions to specific challenges.

The world's youth have an enormous stake in the outcomes of Rio+20 and can play a powerful role in defining the next generation of sustainable development using the technologies of the future. There is also a strong case for the inclusion of women as a vital source of economic growth. Every individual has the opportunity to be a contributing and valued member of the global marketplace—globally, we must support removing barriers that have prevented youth and women from being full participants in the economy and unlocking their potential as drivers of economic growth.

Transforming Traditional Institutions

At the 1992 Earth Summit, leaders recognized the importance of transparent, participatory decision-making at the national level. These dialogues focused on brick-and-mortar institutions. Today, technology is making it easier for governments to share information with the public and for the public to hold decision makers accountable to realize the promise of Principle 10 through diverse and diffuse networks. The Rio+20 Conference is an opportunity to further enhance these efforts – for all participants to share best practices on good national governance

and explore cooperative actions to deepen implementation through formal institutions and informal networks.

The UN system needs to identify a focal point to efficiently bring together the environmental, economic, and social elements of sustainable development. We see an opportunity to reform and modernize existing institutions, such as the Commission on Sustainable Development (CSD) and the Economic and Social Council (ECOSOC), in a manner that engages the entire UN system and provides the UN with cohesive, government-driven policy guidance on sustainable development, a vehicle for engaging civil society, non-government, and private sector stakeholders, and a coordination mechanism to track overall progress.

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Strengthening International Environmental Governance (IEG)

We agree that the UN needs a body through which governments can cooperate to recommend environmental policies, promote best practices, and build national capacity for governance, monitoring, and assessment. That institution – the United Nations Environment Program (UNEP) – already exists and at Rio+20 we need to work together to strengthen it within the UN system to assure a viable environmental pillar that can meet 21st century demands. We do not believe that alternative proposals for a new statutory institution on the environment will strengthen environmental governance or solve any of the problems that we all recognize persist. We think the more effective course is to focus intellectual and financial resources on strengthening existing institutions that have already proven their worth and avoid the distraction of trying to set up something new and untested.

At Rio+20, we want to pursue reforms to increase UNEP's stature and capacity to contribute to sustainable development commensurate with the importance we attach to these issues. Reforms might include seeking universal membership in UNEP, under appropriately-altered governance structures; enhancing UNEP's leadership within the UN system on implementation and science; and strengthening UNEP's ability to assist countries committed to good governance and science-based decision-making in a manner that creates positive spillover into the economic and social domains of development. These reforms can also improve UNEP's operational efficiency by streamlining administrative arrangements of key multilateral environment agreements.

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Informing Decisions, Catalyzing Action, and Measuring Progress

Efforts to help countries obtain and provide environmental information to their citizens and global experts are important contributions to Rio+20. For sustainable development to take hold, policies must be based on sound science and reliable data. With advances in technology, it is now quicker and less costly to collect, monitor, assess, and disseminate data. Countries need to have the capacity to monitor the environment and to integrate that data with economic and social development plans. The United States is cooperating internationally through other fora to share environmental information and promote the use of compatible data systems so that we can better identify where we are achieving sustainable outcomes and where work still remains to be done.

In this vein, Sustainable Development Goals (SDGs), if structured correctly, could be a useful means to assess progress, catalyze action, and enhance integration among all three pillars of sustainable development. Any goals that we might set should go beyond measuring traditional

assistance and towards data-driven and evidence-based tracking of intermediate and end outcomes that are realized through all sources of investment in the green economy. We believe the concept of sustainable development goals is worthy of consideration at Rio+20, and that the discussions at Rio+20 can inform ongoing and future deliberations about the Millennium Development Goals (MDGs) as we approach 2015.

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B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Air Pollution from Ships: IMO Adoption of Efficiency Standards

On July 15, 2011, the Parties to Annex VI of the International Convention for the Prevention of Pollution from Ships ("MARPOL"), acting through the International Maritime Organization ("IMO"), amended Annex VI to include energy efficiency standards for certain new ships. An EPA fact sheet explained the new program:

> The International Maritime Organization has adopted first-ever energy efficiency design standards for new ships. Under this new program, an Energy Efficiency Design Index (EEDI) will be required for new ships, with progressively more stringent efficiency targets phasing in beginning in 2013.
>
> …The EEDI creates a common metric to measure and improve new ship efficiency. This metric is calculated as the rate of carbon dioxide (CO_2) emissions from a ship per transport work performed by the ship. CO_2 emissions are directly related to energy efficiency and are calculated as fuel consumption multiplied by a fuel carbon factor. Transport work is calculated as a function of the cargo capacity of the ship and the design ship speed.
>
> … The EEDI applies to the most energy-intensive segments of the international shipping fleet, representing more than 70 percent of ship emissions.
>
> …A recent study by IMO projects that emissions from shipping will increase 150 percent to 250 percent by 2050 in the absence of policies to reduce emissions.
>
> The IMO study also shows that many options exist to improve the efficiency of new ships, thereby reducing fuel consumption and emissions. The measures identified by the study include hull improvements, propeller/propulsion system upgrades, alternative power options (e.g., towing kite), hull coatings, propeller improvements, auxiliary systems, speed reduction, and main engine improvements.
>
> Although technologies and methods are available today that can be used to improve energy efficiency and therefore achieve cost savings, standards in the form of energy efficiency targets such as the EEDI are needed to provide an incentive for the implementation of this technology. While many of these efficiency improvements will pay for themselves through fuel savings, there are non-financial barriers that prevent their use. These non-financial barriers include 1) fuel price uncertainty, 2) split incentives between owners, operators, and shipyards and 3) lack of good information on

> the fuel efficiency improvements for different technologies, and impact on life cycle costs.
>
> … This efficiency improvement has beneficial energy implications due to reduced oil consumption. More efficient ships will also emit lower amounts of criteria pollutants such as oxides of nitrogen (NOx), oxides of sulfur (SOx), and particulate matter (PM).

The full text of the fact sheet is available at *www.epa.gov/otaq/regs/nonroad/marine/ci/420f11025.pdf*.

2. Fish and marine mammals

a. Illegal, unreported, and unregulated fishing

(1) Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing

On November 14, 2011, President Obama submitted to the Senate, for its advice and consent, the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. See *Digest 2009* at 499-500 for background on the agreement. A Media Note issued by the State Department, excerpted below and available at *www.state.gov/r/pa/prs/ps/2011/11/177154.htm*, described the effects and importance of the agreement.

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Illegal, unreported and unregulated (IUU) fishing is a global problem that threatens healthy ocean ecosystems and sustainable fisheries. It undermines the sustainable practices of legitimate fishing operations in the United States, and elsewhere, and presents unfair market competition to sustainable seafood products. An estimated $10 to $23 billion in global value is lost annually due to IUU fishing.

All fish caught commercially at sea must eventually come to port. The Port State Measures Agreement requires nations that are party to the Agreement to take a number of practical steps to deny port entry and access to port services to foreign fishing and transport vessels that have harvested fish in violation of applicable rules or have supported such fishing.

Following calls from Congress to crack down on illegal fishing worldwide, the United States played an active role in the negotiation and adoption of this Agreement at the Food and Agriculture Organization of the United Nations. The United States was among the nations that signed the Agreement when it was adopted in 2009. To date, 22 nations and the European Union have signed the Agreement, and it will take effect once 25 nations have ratified it. Three nations and the European Union have completed their ratification procedures for the Agreement.

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The Department of State, along with the Department of Commerce and other interested agencies, looks forward to working with the Senate, with a view to securing advice and consent to ratification of the Agreement. The Administration also looks forward to working with both Houses of Congress on legislation to implement the Agreement.

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In his message to the Senate transmitting the Agreement for advice and consent to ratification, President Obama summarized the importance of the Agreement as follows:

> The Agreement established, for the first time at the global level, legally binding minimum standards for port states to control port access by foreign fishing vessels, as well as by foreign transport and supply ships that support fishing vessels. The Agreement also encourages Parties to apply similar measures to their own vessels. Involved Federal agencies and stakeholders strongly support the Agreement. The Agreement establishes practical provisions to prevent fish from illegal, unreported, and unregulated fisheries from entering the stream of commerce. If widely ratified and properly implemented, the Agreement will thereby serve as a valuable tool in combating illegal, unreported, and unregulated fishing worldwide.

Daily Comp. Pres. Docs., 2011 DCPD No. 00867, p. 1.

(2) Report to Congress on Implementation of Title VI of the Magnuson-Stevens Fishery and Conservation Reauthorization Act of 2006

In January 2011, the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration ("NMFS") submitted its biennial report to Congress pursuant to § 406 of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2007 ("MSRA"), Pub. L. No. 109-479, 120 Stat. 3575, 3633. For background on the MSRA, see *Digest 2007* at 706-709; for discussion of the first biennial report submitted in 2009, see *Digest 2009* at 500-05. The 2011 Report identified Colombia, Ecuador, Italy, Panama, Portugal, and Venezuela as states having engaged in IUU fishing during 2009 or 2010. The MSRA also requires identification of states having vessels engaged in bycatch of protected living marine resources ("PLMRs"), but no states were so identified in the report. The 2011 Report also described the corrective actions, new laws, regulations or enforcement activities of the countries identified in the 2009 report leading to the NMFS's certification that each of those six countries (France, Italy, Libya, Panama, and the People's Republic of China) had either provided evidence of corrective action or credibly disputed the original identifications, as required by the MSRA. Excerpts from the report explaining the identifications follow (with footnotes omitted). The full text of the report is available at *www.nmfs.noaa.gov/msa2007/docs/biennia_report_to_congress.pdf*.

* * * *

NMFS identified six countries in the 2009 Report to Congress as having vessels engaged in IUU fishing activity: France, Italy, Libya, Panama, the People's Republic of China, and Tunisia. Each incident of IUU fishing involved an alleged violation of the rules of an international fishery management organization in 2007 or 2008. Under Section 609 of the Moratorium Protection Act, within 90 days of promulgation of a final rule establishing a procedure for certification, and biennially thereafter in the report to Congress, the Secretary must certify to Congress whether an identified nation has taken appropriate corrective action to address the activities for which it has been identified. The NOAA Assistant Administrator for Fisheries has been delegated the authority to make that determination.

After notifying the six countries of their identifications in early 2009, the U.S. Government consulted extensively with those governments, through face-to-face meetings, teleconferences, and correspondence, through the fall of 2010. The six governments provided information that falls into several categories:

* * * *

The rest of this section sets out in detail the consultations that occurred with each identified country, the information produced by those countries about corrective actions such as penalties imposed and fisheries management laws adopted, and NMFS's positive certification for each country. In short, however, the identification, consultation, and certification process in 2009-2010 worked as Congress intended, to promote compliance with international fisheries measures.

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B. Identifications

1. Statutory Requirements and Restrictions

Section 403 of the MSRA, in amending the Moratorium Protection Act, requires that the Secretary identify nations whose vessels are engaged in IUU fishing or PLMR bycatch. The identification process and decisions, in turn, are based on detailed criteria set forth in the act, as well as statutory definitions.

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2. The Identification Process

In preparation for development of the list of nations that are recommended for identification, NMFS published a notice soliciting information on IUU fishing and PLMR bycatch activities (75 Fed. Reg. 10213, March 5, 2010).

Fishing in Violation of International Measures. The first prong of the definition of IUU fishing covers activities that violate measures required under an international fishery management agreement to which the United States is a party (16 U.S.C. 1826j(e)(3)(A)). …

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Overfishing of Shared Stocks. The second prong of the definition of IUU fishing (16 U.S.C. 1826j(e)(3)(B)) includes overfishing of stocks shared by the United States in areas without applicable international measures or management organizations. …

Destructive Fishing Practices on [Vulnerable Marine Ecosystems ("VMEs")]. During the reporting period, NMFS found no nations having conducted IUU fishing activities under the third prong of the definition (16 U.S.C. 1826j(e)(3)(C)). …

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PLMR Bycatch Activities. Identification of nations for bycatch activities may be based only on current activities of fishing vessels of that nation, or on activities in which those vessels have been engaged during the calendar year preceding submission of the biennial report to Congress. Qualifying activities are further restricted to those that result in the bycatch of PLMRs where the relevant international conservation organization has failed to implement effective measures to end or reduce such bycatch, or the nation is not a party to or a cooperating partner with such organization, and the nation has not adopted a regulatory program governing such fishing practices that is comparable to that of the United States, taking into account different conditions. Bycatch activities that fail to meet these standards cannot form the basis for identification.

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3. Countries Identified

NMFS is identifying six countries as having vessels engaged in IUU fishing activity during 2009 and 2010: Colombia, Ecuador, Italy, Panama, Portugal, and Venezuela. Each incident of IUU fishing involved an alleged violation of the rules of an international fishery management organization. The remainder of this section describes in detail the bases for identification for each country, along with other pertinent information and any communications with the governments.

Colombia. No Colombian-flagged vessels adhered to the purse seine closure periods that were in place for tuna conservation in 2009, in violation of IATTC Resolution C-09-01. The Government of Colombia noted at the 2009 and 2010 IATTC meetings that it could not implement the IATTC's closure periods because it had already adopted purse seine closures for 2009 on an individual vessel basis prior to the adoption of IATTC Resolution C-09-01. Colombia, however, joined the consensus allowing C-09-01 to become effective. Colombia's 2009 individual closures were of shorter duration and, thus, less restrictive than the requirements set forth in Resolution C-09-01.

In addition, two vessels flagged to Colombia have been fishing in the IATTC Convention Area in 2009 and 2010 without being on the IATTC Regional Vessel Register, in violation of IATTC Resolutions C-00-06 and C-02-03. Resolution C-00-06 requires that any vessel fishing for tuna and tuna-like species in the Eastern Pacific Ocean must be included on the IATTC Regional Vessel Register. Resolution C-02-03 establishes national capacity limitations in the purse seine fishery and requires that any active purse seine vessel be included on the Regional Vessel Register and be within these capacity limits. The *Marta Lucia R* made four trips and the *Dominador I* six trips in 2009, without being on the IATTC Regional Vessel Register because the capacity currently allocated to Colombia by the IATTC is not sufficient to accommodate these vessels.

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Ecuador. Several purse seine vessels flagged to Ecuador fished in the IATTC Convention Area in 2009 without authorization, in violation of Resolutions C-00-06 and C-02-03. The *Ocean Lady* made five fishing trips in 2009 before being added to the IATTC Regional Vessel Register in March 2010. The owner was granted a fishing license on September 7, 2009, but Ecuador did not make a request to IATTC for entry in the vessel register until March 4, 2010. Ecuador noted at the 2010 IATTC meeting that the government has initiated an administrative proceeding against this vessel, which could result in a penalty for fishing without authorization.

The *Cap. Tino B.* made two fishing trips in 2009 before being included on the IATTC Regional Vessel Register in April 2009. The owner was granted a fishing license on February 12, 2009, but Ecuador did not make a request for entry in the vessel register until April 15, 2009. Ecuador noted at the 2010 IATTC meeting that this vessel is being sanctioned for fishing without authorization. Ecuador stated that it has taken corrective action with regard to the *Ocean Lady* and the *Cap. Tino B.*, but has not yet supplied documentation to that effect.

The *Tuna I* made three fishing trips in 2009 without being on the IATTC Regional Vessel Register. According to the Government of Ecuador, the case against this vessel is pending.

Several other vessels made sets during the purse seine closure of the off-shore area in 2009, in violation of IATTC Resolution C-09-01. The *Lizy* made two sets during that closure. Ecuador noted at the 2010 IATTC meeting that there were proceedings against the *Lizy*. According to the Government of Ecuador, this vessel has been absolved; however, no details were provided.

The *Ocean Lady* also failed to adhere to the 2009 closure. Another vessel, the *Ingalapagos*, made short trips during the 2009 IATTC closure period without an observer or transit waiver, in violation of IATTC Resolution C-09-01. Ecuador noted at the 2010 IATTC meeting and reaffirmed in correspondence that an administrative proceeding against this vessel is pending.

The *Tarqui* increased its capacity, contrary to IATTC Resolution C-02-03. According to the delegation from Ecuador at the 2010 IATTC meeting and correspondence to NMFS, Ecuador has initiated an enforcement proceeding against this vessel; it is pending.

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Italy. During 2009 and 2010, many vessels flagged to Italy fished in violation of ICCAT Recommendation 03-04, which prohibits the use of driftnets for fisheries on large pelagic species, including swordfish and bluefin tuna, in the Mediterranean. Several Italian-flagged vessels were found with *spadara* nets (a type of driftnet used to target swordfish) and *ferrettara* nets (small-mesh driftnets), and with large pelagic species on board. This illegal driftnet activity is described in more detail below and documented in Italian Coast Guard and NGO reports. Italy penalized these vessels through seizure of their catch and nets and the imposition of fines of approximately €2,000 each. The Italian reports demonstrate that some Coast Guard divisions under the direction of that organization's Central Command are conducting enhanced operations to detect illegal driftnet fishing. Violations continue, however, including offenses involving the same vessels.

In July 2009, the *Federica II* was found to have 13 km of *spadara* net and 853 kg of fish onboard. Italy sanctioned the vessel for carrying out commercial fishing using *spadara*, and confiscated 16 swordfish, 24 bluefin tuna, and the nets. Two of the swordfish and 20 of the

bluefin tuna were under the permissible size limit. The *Federica II* had four previous *spadara* and *ferrettara* driftnet violations between 2005 and 2008.

Also in July 2009, the *Maria Ilenia* was found with 16.6 km of driftnet onboard and approximately 1,400 kg of fish. The vessel was sanctioned for carrying out commercial fishing using a 16-km *spadara* net and a *ferrettara* net 600 meters longer than allowed. The catch, consisting of 59 swordfish, four yellowfin tuna, and one fish of unidentified species, for a total weight of 1458.7 kg, along with the nets. Eighteen of the swordfish were smaller than the size limit. The *Maria Ilenia* had a previous *ferrettara* driftnet violation in 2009.

The *Unita' Da Diporto* was sanctioned for carrying out commercial fishing in the summer of 2009 using a 4.5 km *spadara* net. Two swordfish and 27 tuna, with a total weight of 210 kg, were seized along with the net. In August 2009, the *Andrea Doria II* was found with a 15.5 km *spadara* net and 500 kg of swordfish onboard. The vessel was sanctioned for illegal driftnet use by seizure of the swordfish and net. This vessel also had a driftnet infraction in 2006. In August 2009, the *Ross Lucy* was found with *spadara* net and 500 kg of swordfish onboard. Italy sanctioned the vessel for driftnet fishing with seizure of the net and swordfish. The *Ross Lucy*also had a 2006 driftnet violation.

In addition to the previously mentioned vessels, four others were found with *ferrettara* and bluefin tuna on board. Since these vessels had bluefin tuna, they were found to be fishing in contravention of ICCAT Rec. 03-04. The *Maestrale,* sanctioned in April 2010, was caught with 1,076 kg of bluefin tuna, of which 33 fish were under permissible size limits. This vessel also had a *spadara* driftnet infraction in 2008. The *Anna Maria I* was sanctioned in April 2010 after being caught with 837.5 kg of bluefin tuna, of which 81 fish were undersized. This vessel also had a *spadara* infraction in 2008. Two vessels were sanctioned in June 2010: the *Santa Maria A Mare,* after being caught with 120 kg of bluefin tuna, and the *San Saverio,* with 300 kg of undersized bluefin tuna.

The repeat driftnet infractions indicate the need for additional measures to deter this type of IUU activity, including, *inter alia*, implementation of more severe sanctions as allowed under Italian law, such as suspension of fishing authorization or licenses.

* * * *

Panama. Several Panamanian-flagged vessels engaged in fishing activities that violated IATTC conservation and management measures. Among these vessels, several were reported to have fished within the IATTC Convention Area during purse seine closure periods, in violation of IATTC Resolution C-09-01. The *Julie L* made at least one set in the high seas closure area in 2009, and the *La Parrula* at least 30 sets in two trips during the IATTC 2009 purse seine closure. According to the Government of Panama, an investigation carried out by Panamanian authorities on the *Julie L* showed evidence of lack of VMS transmission, in violation of a domestic law, for which a sanction has been applied. ARAP informed the United States that an investigation was opened for the *Julie L* within the penal process for fishing during the closure period. ARAP provided assurance that investigations and proceedings will continue.

The *Sirenza I* was not in port in 2009 at the beginning of the purse seine closure, also in violation of IATTC Resolution C-09-01, which requires members to ensure that at the time a closure begins, and for the entire duration of that period, all purse seine vessels fishing for yellowfin, bigeye, or skipjack tunas that are subject to the closure are in port or obtain a transit waiver to leave port.

The *Tunamar* made one trip in May 2009 while not on the IATTC Regional Vessel Register, in violation of Resolutions C-00-06 and C-02-03. This vessel was added to the IATTC Regional Vessel Register on July 2, 2009. A Panamanian agency is conducting an internal investigation to ascertain the responsibility of the official who authorized the *Tunamar* to fish without being registered with IATTC. According to the delegation from Panama at the 2010 IATTC meeting, sanctions have been issued against this vessel.

* * * *

Portugal. Two vessels flagged to Portugal engaged in fishing activities during 2010 that violated conservation and enforcement measures of NAFO. The *Aveirense* was found in the NAFO Regulatory Area on March 10, 2010, by Canadian inspectors and in port on July 12, 2010, in apparent infringement of a NAFO conservation and enforcement measure (Chapter I, Article 13.6) because the mesh in the cod end of the net was obstructed. These incidents are under investigation. Further information from the NAFO Secretariat confirms the infringement that was detected by the Canadian inspectors. According to the Government of Portugal, with respect to the *Aveirense*, it brought a proceeding against the captain and the ship owner; the case is pending.

The *Franca Morte* was inspected at sea on April 1 and 2, 2010, and in port on April 29, 2010, and was found to be using smaller than the required mesh size on two of the four panels of the fishing trawl, an infringement of Chapter I, Article 13. EU inspectors confirmed that this was an infringement as detected and reported by Canadian inspectors. The EU Report on Infringement dated August 2010 indicates that a case is pending against this vessel. According to the Government of Portugal, a final decision has been reached in the proceeding against this vessel. However, no further information was provided on the nature of this decision or any resulting action to be taken against the vessel.

* * * *

Venezuela. Two vessels flagged to Venezuela were reported to have fished during IATTC purse seine closure periods in 2009, in violation of IATTC Resolution C-09-01. The *Don Francesco* made 19 sets during the purse seine closure in the Eastern Pacific Ocean. The *Athena F* made a transit trip without an observer or a transit waiver during the closure period in 2009, in violation of IATTC Resolution C-09-01, which requires members to ensure that during a closure all purse seine vessels subject to the closure are in port or obtain a transit waiver to leave port.

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On January 12, 2011, the Commerce Department's National Oceanic and Atmospheric Administration ("NOAA") issued a final rule setting forth procedures for the identification and certification of foreign nations whose fishing vessels are engaged in IUU fishing or bycatch of PLMRs. 76 Fed. Reg. 2011 (Jan. 12, 2011). The Supplementary Information section in the Federal Register explained:

> The [MSRA] does not require publication of identification procedures in a rule, but in the interest of transparency and to provide context for subsequent certification determinations, NMFS decided to address identification in this action. NMFS made its

first identifications in the January 2009 Biennial Report to Congress based on authority provided in the Moratorium Protection Act only, as these regulations were not yet in place.

Excerpts follow from the Federal Register publication of the final rule, explaining the procedures for, and effects of, the certifications and identifications made in the biennial reports to Congress.

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Procedures To Identify Nations Engaged in IUU Fishing

As required under the Moratorium Protection Act, NMFS will identify, and list in the biennial report to Congress, that those nations whose fishing vessels are engaged, or have been engaged at any point during the preceding 2 years, in IUU fishing.

When determining whether to identify a nation as having fishing vessels engaged in IUU fishing, NMFS will exercise due diligence in evaluating appropriate information and evidence available to the agency. This information could include data, gathered by the U.S. Government as well as offered by other nations, international organizations (such as regional fisheries management organizations (RFMOs)), institutions, or arrangements that, if true, could support a determination that a nation's vessels have been engaged in IUU fishing. NMFS will review and verify the pertinent information when determining, for the purposes of identification, whether a nation's fishing vessels are engaged, or have been engaged, during the preceding 2 years in IUU fishing as defined under the Moratorium Protection Act.

Once NMFS has determined that the information received is credible and provides a reasonable basis to believe or suspect that a nation's fishing vessels are engaged in IUU fishing, NMFS, acting through or in consultation with the State Department, will initiate bilateral discussions with the nation to:

- Seek corroboration of the alleged IUU activity or credible information that refutes such allegations;
- Communicate the requirements of the Moratorium Protection Act to the nation; and
- Encourage such nation to take action to address the alleged IUU fishing activity in question.

Prior to making identifications, NMFS will consider measures taken by the nation to address the IUU fishing activity of its vessels, information refuting allegations of IUU fishing activity, and domestic laws or regulatory programs designed to address IUU fishing activity, along with all verified information on alleged IUU fishing activity.

In determining whether to make an IUU fishing identification, NMFS will consider whether a nation has implemented and is enforcing measures that are deemed comparable in effectiveness to measures implemented by the United States to address the pertinent IUU fishing activity. NMFS will also consider if an international fishery management organization exists with a mandate to regulate the fishery in which the IUU activity in question takes place, whether or not the nation is party to or maintains cooperating status with the organization, and whether or not the relevant RFMO has adopted measures that are deemed by NMFS to be effective at addressing such IUU fishing activity. If the nation is a party or cooperating non-party to the

relevant RFMO, NMFS will consider whether the nation has implemented and is enforcing measures of that organization.

Measures by nations to address IUU fishing could include those that reflect the recommendations of international organizations to prevent, deter and eliminate IUU fishing. …

Notification of and Consultations With Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

Upon identifying a nation whose vessels have been engaged in IUU fishing activities in the biennial report to Congress, the Secretary of Commerce will notify the President of such identification. Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will notify:

1. Nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding 2 calendar years, in IUU fishing activities;

2. Identified nations of the requirements under the Moratorium Protection Act and this subpart; and

3. Any relevant international fishery management organization of actions taken by the United States to identify nations whose fishing vessels are engaged in IUU fishing.

Within 60 days after submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will initiate consultations with nations that have been identified in the biennial report as having fishing vessels that are currently engaged, or were engaged at any point during the preceding 2 calendar years, in IUU fishing activities for the purpose of encouraging such nations to take appropriate corrective action with respect to the IUU fishing activities described in the biennial report.

Procedures To Certify Nations Identified as Having Fishing Vessels Engaged in IUU Fishing

Subsequent to the identification, notification, and consultation processes outlined above, the Secretary will provide either a positive or negative certification to nations that have been identified in the biennial report as having fishing vessels engaged in IUU fishing. The Secretary of Commerce shall issue a positive certification to an identified nation upon making a determination that such nation has taken appropriate corrective action to address the activities for which such nation has been identified in the biennial report to Congress. …

* * * *

The Secretary of Commerce will make certification determinations pursuant to provisions of the Moratorium Protection Act in accordance with international law, including the WTO Agreement, regarding adoption of trade measures in a fair, transparent, and non-discriminatory manner. When considering whether appropriate corrective action has been taken to warrant a positive certification, NMFS will take into account the outcome of consultations with the identified nation and comments received from such nation. NMFS will also evaluate actions taken by the relevant nation and applicable RFMO to address the IUU fishing activity described in the biennial report, including participation in applicable RFMOs and requests for assistance in building fisheries management and enforcement capacity. NMFS will also consider, as appropriate, whether the affected nation has implemented and is enforcing RFMO conservation and management measures designed to address IUU fishing activities.

The Secretary of Commerce will make the first certification determinations no later than 90 days after promulgation of this rule. Subsequent certification determinations will be published in the biennial report. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with negatively certified nations and provide them an opportunity to take corrective action with respect to the IUU fishing activities described in the biennial report to Congress.

Procedures To Identify Nations Engaged in PLMR Bycatch

As required under the Moratorium Protection Act, NMFS will also identify, and list in the biennial report to Congress, nations whose fishing vessels are engaged, or have been engaged during the preceding calendar year in fishing activities either in waters beyond any national jurisdiction that result in PLMR bycatch, or beyond the U.S.
exclusive economic zone (EEZ) that result in bycatch of a PLMR shared by the United States.

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Pursuant to the requirements under the Moratorium Protection Act, NMFS will publish a list of nations that have been identified as having fishing vessels engaged in bycatch of PLMRs in the biennial report to Congress.

Notification and Consultation With Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

After submission of the biennial report to Congress, the Secretary of Commerce, acting through the Secretary of State, will officially notify nations that have been identified in the biennial report as having fishing vessels that are engaged in bycatch of PLMRs. Within 60 days after submission of the biennial report to Congress, NMFS, acting through or in consultation with the State Department, will notify such nations of the requirements of the Moratorium Protection Act and initiate consultations regarding the bycatch of PLMRs.

Upon submission of the biennial report to Congress, the Secretary of Commerce, acting through or in consultation with the Secretary of State, will:

1. Initiate consultations with the governments of identified nations for the purposes of entering into bilateral and multilateral agreements and treaties with such nations to protect the PLMRs from bycatch activities described in the biennial report; and

2. Seek agreements through the appropriate international organizations calling for international restrictions on the fishing activities or practices described in the biennial report that result in bycatch of PLMRs and, as necessary, request that the Secretary of State initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs in question to make such agreements consistent with this subpart.

International Cooperation and Assistance

To the greatest extent possible consistent with existing authority and the availability of funds, NMFS shall provide assistance to nations identified as having vessels engaged in PLMR bycatch. NMFS will also provide assistance to international organizations of which those nations are members to assist with qualifying for a positive certification. Assistance activities may include, where appropriate, cooperative research activities on species assessments and improved bycatch mitigation techniques, improved governance structures, or improved enforcement capacity. NMFS will also encourage and facilitate the transfer of appropriate technology to identified nations or the organizations of which they are members to assist identified nations in

qualifying for a positive certification and to assist those identified nations or organizations in designing and implementing appropriate fish harvesting methods that minimize bycatch of PLMRs.

Procedures To Certify Nations Identified as Having Fishing Vessels Engaged in Bycatch of PLMRs

Based on the identification, notification, and consultation processes outlined above, NMFS will certify nations that have been identified in the biennial report as having fishing vessels engaged in bycatch of PLMRs. NMFS will notify nations prior to a formal certification determination and will provide such nations an opportunity to support and/or refute preliminary certification determinations, and communicate any corrective actions taken to address the bycatch of PLMRs described in the biennial report to Congress.

* * * *

The Secretary of Commerce will make certification determinations pursuant to provisions of the Moratorium Protection Act in accordance with international law, including the WTO Agreement, regarding adoption of trade measures in a fair, transparent, and non-discriminatory manner. When making certification determinations, the Secretary of Commerce will, in consultation with the Secretary of State, evaluate the information discussed above, comments received from such nation, the consultations with each identified nation, and subsequent actions taken by the relevant nation to address the bycatch of PLMRs described in the biennial report, including requests for assistance in the implementation of measures comparable to those of the United States and establishment of an appropriate management plan. The Secretary of Commerce will also take into account whether the nation participates in existing certification programs, such as that authorized under section 609 of Public Law 101-162, or the affirmative finding process under the International Dolphin Conservation Program Act (111 Stat. 1122). Nothing in this rulemaking will modify such existing certification procedures.

The Secretary of Commerce will publish certification determinations in the biennial report to the Congress. Identified nations will receive notice of certification determinations.

Once certification determinations are published in the biennial report, NMFS will, working through or in consultation with the Department of State, continue consultations with the negatively-certified nations and provide them an opportunity to take corrective action with respect to the bycatch of PLMRs described in the biennial report to Congress.

Effect of Certification Determinations

If nations identified as having fishing vessels engaged in IUU fishing and/or bycatch of PLMRs receive a positive certification from the Secretary of Commerce pursuant to the Moratorium Protection Act, no actions will be taken against such nations.

If an identified nation fails to take sufficient action to address IUU fishing and/or bycatch of PLMRs and does not receive a positive certification from the Secretary of Commerce, the nation could face denial of port privileges for its fishing vessels, prohibitions on the import of certain fish and fish products into the United States, and other appropriate measures. In determining the appropriate course of action to recommend to the President, the Secretary of Commerce and other Federal agencies, as appropriate, will take into account the nature, circumstances, extent, duration, and gravity of the fishing activity for which the initial identification was made; the degree of culpability; any history of prior IUU fishing activities or bycatch of PLMRs; and other relevant matters. The Secretary of Commerce, in

cooperation with the Secretary of State, may initiate further consultations with identified nations that fail to receive a positive
certification prior to determining an appropriate course of action.

The Secretary of Commerce will recommend to the President appropriate measures, including trade restrictive measures, to be taken against identified nations that have not received a positive certification, to address the relevant IUU fishing activity and/or fishing activities or practices that result in PLMR bycatch for which such nations were identified in the biennial report. The Secretary will make such recommendations on a case by case basis in accordance with international obligations, including the WTO Agreement. Adoption of trade measures will be done in a fair, transparent, and non-
discriminatory manner. If certain fish or fish products of a nation are subject to import prohibitions, to facilitate enforcement, NMFS may require that other fish or fish products from that nation that are not subject to the import prohibitions be accompanied by documentation of admissibility to be developed by NMFS. If NMFS decides to require that such fish or fish products be accompanied by documentation of admissibility, it will develop this documentation through a future rulemaking action and give the public an opportunity to review and provide comment.

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b. Sea turtle conservation and shrimp imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On April 22, 2011, the Department of State made its annual certifications related to conservation of sea turtles. As excerpted below, the Federal Register notice announcing the State Department's April 22 certifications explained the Department's determinations and the applicable legal framework. 76 Fed. Reg. 32,010 (June 2, 2011).

* * * *

Section 609 of Public Law 101-162 ("Section 609"") prohibits imports of certain categories of shrimp unless the President certifies to the Congress not later than May 1 of each year either: (1) that the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State ("the Department"). Revised State Department guidelines for making the required certifications were published in the Federal Register on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On April 22, 2011, the Department certified 12 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Colombia, Ecuador, El

Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Nigeria, Pakistan, Panama, and Suriname.

The Department also certified 26 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Ten nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The 10 nations and
one economy are: the Bahamas, Belize, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru, Sri Lanka, and Venezuela.

The Department certified Belize this year on a different basis than last year. Effective December 31, 2010, the Government of Belize passed a law banning all forms of trawling in its waters, including its exclusive economic zone. The ban remains in effect. As a result, the Department has certified Belize as a nation whose fishing environment does not pose a threat of the incidental taking of sea turtles.

On April 22, 2011, the Department decertified Madagascar. In the absence of a legitimate constitutional government in Madagascar since the 2009 coup d'état, relations between the United States and the de-facto Malagasy authorities have been extremely limited. The Department of State and NOAA have been unable to conduct a Government of Madagascar sea turtle protection program verification visit since September 2008. Without the ability to independently verify whether Madagascar has a sea turtle protection program comparable to that of the United States, the Department is unable to certify Madagascar this year.

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3. Biodiversity Beyond National Jurisdiction

The fourth meeting of the UN General Assembly's informal working group on marine biodiversity in areas beyond national jurisdiction took place May 31 to June 3, 2011 in New York. As in past years, the major topics of discussion included environmental impact assessments, marine protected areas, and marine genetic resources. The working group adopted recommendations that were transmitted to the UN General Assembly for endorsement in its resolution on oceans and law of the sea, adopted December 24, 2011. U.N. Doc. A/RES/66/231.

The U.S. opening statement at the meeting reiterated the U.S positions expressed at past meetings of the working group. See *Digest 2010* at 557-58. Specifically, the U.S. opening statement explained U.S. support for the use of environmental impact assessments for planned activities that may cause substantial pollution of or significant and harmful changes to the marine environment in areas within and beyond national jurisdiction. The U.S. opening statement expressed support for using marine protected areas that are based on the best available science and for which implementation, compliance, and enforcement

measures are "consistent with customary international law as reflected in the Law of the Sea Convention." In addition, the U.S. opening statement highlighted "the need and opportunity to strengthen implementation of our commitments to conserve and sustainably use high seas living marine resources," and reiterated the following U.S. position:

> While some have called for a new international regime regarding marine genetic resources in areas beyond national jurisdiction, we continue to believe this is unnecessary and undesirable. As we have stated in prior meetings, we do not support the development of a regime for benefit-sharing for the products derived from marine genetic resources found in areas beyond national jurisdiction.
>
> First, customary international law as reflected in the Law of the Sea Convention provides the framework under which all activities in the ocean are to be governed. The use and protection of living resources in areas beyond national jurisdiction fall under the high seas regime of the Law of the Sea Convention (part VII). As we are all aware, there are key provisions in the Convention regarding the conservation and management of living resources found in the high seas.
>
> Second, we do not believe that a new legal regime regarding benefit sharing for marine genetic resources in areas beyond national jurisdiction would lead to greater conservation or sustainable use of marine biodiversity. On the contrary, we are concerned that such a regime would impede invaluable research and development. The greatest benefits to humanity from marine genetic resources will come from the worldwide availability of the products stemming from these living resources, and the contributions those products make in fundamental areas such as better public health, improved agricultural processes, and new scientific knowledge. Furthermore, development of products derived from marine genetic resources has proven to be an expensive, risky, complex, and lengthy undertaking, and one that results not simply from collecting the organism, but rather from years of research, innovation, investment, and ingenuity. Therefore, we do not support the development of a benefit-sharing regime for products made from marine genetic resources obtained from areas beyond national jurisdiction, but we of course do support appropriate conservation and sustainable use of these resources.

C. OTHER CONSERVATION ISSUES

On October 18, 2011, Steven Hill, Counselor to the U.S. Mission to the UN, delivered a statement in the General Assembly's Sixth Committee on the International Law Commission's ("ILC" or "Commission") work on transboundary aquifers. The ILC completed draft articles on transboundary aquifers at its sixtieth session in 2008, and the UN General Assembly took note of them in the resolution it adopted on the law of transboundary aquifers on December 11, 2008. U.N. Doc. A/RES/63/124. Mr. Hill's statement reiterated the U.S. view that the draft articles are a useful tool that states might use in negotiating bilateral or regional arrangements but that incorporating the draft articles into a

multilateral treaty would not be appropriate. The U.S. statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2011/177343.htm*.

* * * *

The United States continues to believe that the International Law Commission's work on transboundary aquifers has constituted an important advance in providing a possible framework for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations. For all states, and especially those struggling to cope with pressures on transboundary aquifers, the Commission's effort to develop a set of flexible tools for using and protecting these aquifers has been a very useful contribution.

With respect to next steps, there is still much to learn about transboundary aquifers in general, and specific aquifer conditions and state practices vary widely. Moreover, many aspects of the draft articles clearly go beyond current law and practice. For these reasons, the United States continues to believe that context-specific arrangements provide the best way to address pressures on transboundary groundwaters in aquifers, as opposed to a global framework treaty. States concerned should take into account the provisions of these draft articles when negotiating appropriate bilateral or regional arrangements for the proper management of transboundary aquifers.

Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. These factors will vary in each particular set of circumstances, and maintaining the articles as a resource in draft form seems to us the best way of ensuring that the draft articles will be a useful resource for States in all circumstances.

If the draft articles were fashioned into a global convention, we remain unconvinced that it would garner sufficient support. We also note that the draft articles seem to cover some waters that are already within the scope of the 1997 Watercourses Convention, such that the existence of two overlapping framework conventions could lead to confusion.

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Cross References

Human rights and climate change, **Chapter 6.G.**
Immunity from attachment of multinational research satellite, **Chapter 10.A.2.a.(1)**
EU's Emissions Trading Scheme, **Chapter 11.A.2.**
World Trade Organization (Dolphin/Tuna Dispute), **Chapter 11.C.1.**
Environmental obligations in trade promotion agreement, **Chapter 11.D.4.**